

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Crisfield, Maryland, Belle Haven, Nassawadox,)
Exmore, and Poquoson, Virginia)
)

MM Docket No. 02-76
RM-10405
RM-10499

To: Assistant Chief, Audio Division
Media Bureau

PETITION FOR RECONSIDERATION

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November 17, 2003

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SUMMARY OF PLEADING

The following pleading is being filed by Tidewater Communications, LLC (“Tidewater”) and seeks reconsideration of the action of the Audio Services Division (“ASD”) in its Report and Order, *Crisfield, Maryland; Belle Haven, Cape Charles, Exmore, Nassawadox, and Poquoson, Virginia*, DA 03-2980, released September 29, 2003 [69 Fed. Reg. 59848, published October 17, 2003] (herein “*R&O*”) which granted a proposal described in a “Counterproposal” filed June 3, 2002 by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications proposing (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia; (3) re-allotment of Channel 291A from Exmore, Virginia, to Poquoson, Virginia, with concurrent modification of the license of WEXM, Exmore, to operate at Poquoson; and the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia and the removal of the only commercial radio station from Cape Charles. The *R&O* rejected Tidewater’s evidence that showed that Sinclair’s proposal is fatally defective because (1) Belle Haven is not a community for allotment purposes; (2) USGS maps show the Poquoson Reference Site is over water and unsuitable, (3) Poquoson is merely a “bedroom community” for the Norfolk/Virginia Beach/Newport News Urbanized Area and does not merit a first local service preference, and (4) there are no public interest benefits to removing the only commercial station from Cape Charles to allot the 40th service to the Norfolk/Virginia Beach/Newport News Urbanized Area. Tidewater shows herein that the ASD erred when it accepted and granted the counterproposal because it was defective when filed, and should have been dismissed.

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Exmore, Nassawadox, and Poquoson, Virginia))	

To: Assistant Chief, Audio Division
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PETITION FOR RECONSIDERATION

Tidewater Communications, LLC ("Tidewater"),¹ by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby files its Petition for Reconsideration of the action taken by the Assistant Chief, Audio Services Division ("ASD"), in the Report and Order, *Crisfield, Maryland; Belle Haven, Cape Charles, Exmore, Nassawadox, and Poquoson, Virginia*, DA 03-2980, released September 29, 2003 [69 Fed. Reg. 59848, published October 17, 2003] (herein "*R&O*").² The *R&O* granted a defective counterproposal filed June 3, 2002 by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as "Sinclair"). The Counterproposal proposed (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at

¹ Tidewater Communications, LLC, is the successor in interest to Tidewater Communications, Inc.

² Pursuant to Section 1.429 and 1.4(a)(1) of the Rules, this petition is due within 30 days of the date of publication of the *R&O* in the *Federal Register* (October 17, 2003), or by November 17, 2003; and, as such, this petition is timely filed.

Nassawadox, Virginia; (3) re-allotment of Channel 291A from Exmore, Virginia, to a bedroom community in the Norfolk/Virginia Beach/Newport News, Virginia, Urbanized Area called Poquoson with concurrent modification of the license of Sinclair's WEXM³, Exmore, to operate at Poquoson; and (4) to replace the loss of WEXM, the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia, resulting in the removal of the only commercial radio station from Cape Charles. Sinclair's counterproposal was filed in conflict with a proposal by Bay Broadcasting, Inc. ("BBI"), licensee of WBEY(FM), Crisfield, Maryland, to substitute Channel 250A for Channel 245A at Crisfield.⁴ On July 16, 2003, Tidewater timely filed Reply Comments to Sinclair's counterproposal showing that Sinclair's proposal was fatally flawed and need not be compared to BBI's proposal and BBI's proposal could be adopted without making a comparison.

The ASD denied BBI's proposal on technical grounds and ignored or brushed aside Tidewater's arguments. Most importantly, the ASD, without any discernible basis, rejected Tidewater's showing that Sinclair's proposed transmitter site was over water and unsuitable, and permitted Sinclair to patch up its defective counterproposal by the filing of unauthorized pleadings. Tidewater requests the ASD to reconsider its decision in the *R&O* and to deny Sinclair's counterproposal.⁵

³ Licensed to Commonwealth Broadcasting, L.L.C., which is commonly owned with Sinclair Telecable LLC.

⁴ *Notice of Proposed Rule Making*, DA 02-864, released April 12, 2002.

⁵ Tidewater takes no position herein on the viability of BBI's proposal.

I. Preliminary Statement

Tidewater showed in its Reply Comments that Sinclair's proposal is nothing more than a proposal to add the **40th** signal to the already over-radioed Norfolk Arbitron market. To accomplish this, Sinclair had to persuade the ASD to allot a new channel to the hamlet of Belle Haven, which Tidewater showed does not meet the Commission's criteria as a community for allotment purposes. Tidewater also showed that the reference site selected for the allotment of Channel 291A at Poquoson as depicted on USGS 7.5 minute topographic maps is over water and unusable. Tidewater also showed that Sinclair intends to abandon Cape Charles and leave it with only a noncommercial educational station that cannot be considered an equivalent service to replace the loss of WROX-FM. The ASD rejected each of these arguments. Moreover, the ASD refused to accept Tidewater's argument that Sinclair could not amend and supplement its counterproposal to provide information it omitted from its counterproposal, stating that the ASD need not "face this issue that Tidewater has attempted to raise in this proceeding, because the information submitted by Sinclair in its Counterproposal" was, in the ASD's view, technically correct and substantially complete as filed. Thus, the ASD, on the one hand found that Sinclair's counterproposal was correct and complete on the deadline for comments and counterproposals, but on the other hand, permitted Sinclair to file a 162-page supplement "to answer those questions [Tidewater raised] and provide a complete record..." As shown, *infra*, that was contrary to settled law. The ASD should reconsider the action taken in its *R&O*, refuse to allot Channel 291A to

Poquoson, Virginia, and not make the other changes required to accommodate the Poquoson allotment.

II. USGS Maps Show the Reference Site for Poquoson Is Over Water and the Counterproposal Is Defective as a Result

The reference site Sinclair specified for the proposed allotment of Channel 291A at Poquoson, Virginia, is **North Latitude 37° 12' 30" and West Longitude 76° 25' 05"**⁶. Tidewater submitted a Technical Statement that provided a copy of a 7.5 minute topographic map of the area where Sinclair designated its reference coordinates. Attached hereto is the Declaration of Tidewater's technical consultant to which is attached a copy of previously-submitted maps that show that the intersection of the coordinates is clearly offshore within a body of water which renders the site unsuitable. The ASD refused to rely on Tidewater's [or, for that matter, Sinclair's] evidence submitted to patch up its counterproposal, and dispensed of this argument as follows:

We have reviewed this matter, using detailed maps and other relevant material from the United States Geological Survey (USGS) internet site (www.usgs.gov). These materials include a topographic map and a navigational photo of the area designated as Sinclair's transmitter site at reference coordinates of: 37-12-30 North Latitude and 76-25-05 West Longitude. [*] They clearly show that the referenced site is on dry land. In making this finding, we do not rely on Exhibits 1 and 2, which are attached to Sinclair's Response. Exhibit 1 uses computer mapping programs and Exhibit 2 is based on the use of a "Garmin Global Positioning System" ("GPS") receiver. There is no basis in the record for the Commission to evaluate the accuracy or reliability of these submissions.

[*] When viewing either the topographic map or navigational photo, coordinate information (latitude and longitude) is simultaneously displayed for any particular point chosen on the map or photo.

Tidewater's legal counsel and its engineering counsel tried to duplicate the ASD's feat; however, both were unable to do so. The map on the USGS site did not refine the search

⁶ These coordinates are also listed on the Commission's July 1, 2002, Public Notice.

sufficiently to make a determination to confirm that the site is on dry land. Moreover, the coordinate readout on the website has not been shown to be accurate.

Section 73.312 of the Commission's rules mandates the use of USGS topographic maps in determining the location of antenna sites.⁷ So far as Tidewater can determine, this is the first case where the ASD has relied on an electronic map on the internet rather than a printed 7.5 minute topographic map. The Commission's staff has long relied on examination of USGS maps to resolve disputes over site location. See the Memorandum Opinion and Order in MM Docket No. 82-754, *Hatch and Las Cruces, NM*, released July 7, 1986 (1986 Lexis 3007). In *FM Transmitter Site Map Submissions Required by Forms 301 and 340*, 1 FCC Rcd 381 (1986), the Commission set forth standards requiring applicants for AM, FM and TV station construction permits to submit a 7.5 minute series USGS topographic quadrangle map specifying the proposed antenna and transmitter site. The June 2002 edition of the Instructions to Form 301 explains how the Commission expects applicants to provide site information, citing, *FCC Interim Procedures for the Specification of Geographic Coordinates*, 3 FCC Rcd 1478 (1988), which makes reference to 7.5 minute USGS topographic maps. The 7.5 minute paper topographic map is the current gold standard. As such, the printed USGS map attached hereto and submitted with Tidewater's Reply showing the reference coordinates to be over water must govern. In *Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon and Naples, Florida*, 10 FCC Rcd 6548 (1995), the

⁷ Section 73.312(a) provides, in pertinent part, "In the preparation of the profile graphs previously described, and in determining the location and height above mean sea level of the antenna site, the elevation or contour intervals shall be taken from United States Geological Survey Topographic Quadrangle Maps, United States Army Corps of Engineers Maps or Tennessee Valley Authority maps, whichever is the latest, for all areas for which such maps are available."

Commission explicitly said: “We have consistently rejected any proposed reference sites that fall within bodies of water.” This is a fatal defect since Sinclair may not amend its proposal to attempt to specify a different site. As stated *supra*, it is well established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. See Section 1.420 (d) of the Commission’s Rules, *George West, Texas*, 18 FCC Rcd 12804 (2003), citing with approval, *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988), *recon. den.* 4 FCC Rcd 6981 (1989) and *Springdale Arkansas et al.*, 4 FCC Rcd 674 (1989), *recon. denied*, 5 FCC Rcd 1241 (1990).) In contravention of established precedent, not only did the ASD, using an unauthorized method, find that Sinclair’s proposed site is on “dry land,” the ASD went one step further and changed Sinclair’s reference site for the Poquoson allotment to 37-12-30 North Latitude and 76-25-07 West Longitude. There is no legal support for such action, which denies Tidewater due process.

III. Belle Haven, Virginia, Is Not a Community for Allotment Purposes

The ASD found that Belle Haven constitutes a community for allotment purposes. Tidewater strongly disagrees. Tidewater showed that Belle Haven is nothing more than a crossroads with a 2000 population of 480 that could not possibly support a radio station. In its counterproposal, the best Sinclair could say about Belle Haven is that it has “over two hundred houses,” its own post office/zip code, numerous businesses and two churches [emphasis supplied].” Sinclair did not identify the businesses or churches. An

in-person visit to Belle Haven by the former president⁸ of Tidewater, revealed that there are few businesses in Belle Haven excluding the post office and a church (the second church was not apparent), that Belle Haven's mayor is part time and works out of an office at the fuel company, and there is no town hall. Tidewater alleged that Belle Haven does not provide any municipal services, but the ASD found that the town provides garbage pickup and street lighting, based on Sinclair's improperly-submitted supplement. The ASD glossed over Tidewater's evidence:

We find that Belle Haven constitutes a community that qualifies for an FM allotment pursuant to Section 307(b) of the Act. Tidewater has failed to rebut the presumption, derived from the facts that Belle Haven is incorporated and listed in the 2000 U.S. Census, that Belle Haven is clearly a "distinct geographical population grouping," *i.e.*, a grouping of residents with a common identity evidenced by a town government, local businesses, a post office and churches. [footnote omitted] We observe that, without including businesses and other entities outside of the corporate boundaries of Belle Haven, Belle Haven has at least 9 businesses and six non-business institutions, including a U.S. Post Office, a Head Start facility, two churches with "Belle Haven" in their names, and an arts center, within its corporate boundaries.

This additional information on which the ASD based its decision came, not from the evidence submitted by the deadline for counterproposals, but from a 162-page unauthorized⁹ "Counterproponents' Response to Reply Comments on Counterproposal" filed August 16, 2002. Sinclair submitted that pleading in an attempt to correct the fatal deficiencies in its counterproposal. It was improper for the ASD to grant Sinclair's motion for leave to accept the supplement. As stated in *Broken Arrow, supra*, it is well

⁸ Due to a corporate reorganization, when Tidewater Communications, LLC, replaced Tidewater Communications, Inc., the office of corporate president was made vice president of the limited liability company.

⁹ The rules do not contemplate supplementary filings, although the ASD granted Sinclair's motion to accept the supplement.

established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments so that all parties are afforded an opportunity to respond in reply comments. Sinclair could have provided all the information in its supplement by the comment date, but failed to do so. If Sinclair's original counterproposal was substantially complete, there was no reason to file a 162-page supplement. The very act of filing the supplement establishes that the counterproposal was not substantially complete on the deadline date for filing counterproposals.

There is no reason for the ASD to depart from established precedent to consider this supplementary information, and Tidewater objects to such a ruling. However, even if the evidence were legitimately in the record, which Tidewater protests, the ASD's finding based on the observation that "Belle Haven has at least 9 businesses and six non-business institutions, including a U.S. Post Office, a Head Start facility, two churches with "Belle Haven" in their names, and an arts center, within its corporate boundaries," is not sufficient evidence of community status. It is contrary to *Gretna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), which Tidewater cited, where the Commission refused to find that the community of Steinhatchee, Florida, was a community even though it has a post office, its own zip code, a grade school, six churches, a business district with restaurants and other retail outlets and a population of approximately 1,500. Steintachee was listed in the 1988 edition of the Rand McNally Commercial Atlas with a population of 800. The only difference between Steinhatchee and Belle Haven is that Belle Haven is incorporated. Notwithstanding the ASD's finding, Tidewater has rebutted the presumption of community status conferred by

incorporation. See also, *Pike Road and Ramer, AL*, 10 FCC Rcd 10347 (1995), where the Commission refused to allot a channel to Ramer, Alabama, which was touted as "a functioning, ... incorporated community... with municipal services." There was some question as to incorporation. Even though the Commission found that Ramer has a post office, zip code, and a population of 450, the presence of a post office and zip code was not sufficient to establish community status, citing *Crestview and Westbay, Florida*, 7 FCC Rcd 3059 (1992), and cases cited therein. The Commission said it was incumbent upon the proponent to initially present the Commission with sufficient evidence to demonstrate that Ramer is a community for allotment purposes. Having failed to do so, the Commission concluded that Ramer was not a *bona fide* community for allotment purposes and denied the proposal.

Tidewater has showed that Belle Haven is incorporated in name only, with a part-time mayor whose office is at the local fuel store; a place with few operating businesses, that provides (as found by the FCC) two municipal services. Ignoring Tidewater's evidence and arguments does violence to the Commission's allotment scheme. Sinclair's only goal in this proceeding is to improve the facilities of WEXM, by moving the station from the eastern-shore town of Exmore to the middle of the Norfolk/Virginia Beach/Newport News Urbanized Area. But, to do so, Sinclair had to convince the ASD to allot Channel 250B1 to Belle Haven so that Sinclair's counterproposal would be mutually-exclusive with BBI's proposal for Channel 250A at Crisfield, Maryland. It is highly unlikely that any broadcaster would invest the funds necessary to build a 25,000 watt radio station to serve 9 businesses, six non-business institutions, including a U.S. Post Office, a Head Start facility, two churches with "Belle

Haven” in their names, and an arts center. Commercial radio stations depend on advertisers to pay the bills. It is ludicrous to believe that 9 businesses and six non-business institutions, including a U.S. Post Office, a Head Start facility, two churches with “Belle Haven” in their names, and an arts center will purchase advertising on a Belle Haven station. In a community that small, what need would there be for radio advertising? The whole business community could meet in the post office, the Head Start facility or one of the two churches. Belle Haven straddles Accomack County (2000 population 38,305) and Northampton County (2000 population 13,093), which comprise Virginia’s entire eastern shore peninsula. The largest city on the peninsula, Chincoteague (Accomack County) with a 2000 population of 4,317, has a commercial station assigned to it (WCTG), but Commission records show that station to be a “CP OFF AIR.” Although the Commission may deride this comment as “speculative,” there is every reason to believe that Channel 250B1 at Belle Haven will lie fallow as other allotments made to remote communities have done which precludes the use of the channel at a *bona fide* community. The Commission should seriously reflect on its policies of allotting channels to pseudo-communities like Belle Haven and put a stop to it here.

IV. Poquoson Is Not Entitled to a First Local Service Preference

Tidewater submitted its evidence on the other flaws in Sinclair’s counterproposal, which was also rejected by the ASD. Tidewater showed that, under *Fairfield and Norwood*, Ohio, 7 FCC Rcd 2371 (1992), as a small community completely surrounded by a larger metropolitan area with an abundance of radio service, Poquoson is not entitled to a preference over Cape Charles on Section 307(b) grounds. Again, the ASD did not bother to distinguish, or even mention, Tidewater’s citation of this case. Since Poquoson

is within an Urbanized Area, under *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995), Sinclair submitted a showing pursuant to *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) and *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990), *vacated as moot*, 6 FCC Rcd 1808 (1991) (“KFRC”), but that showing fell short of demonstrating that Poquoson is entitled to a first local service preference. Tidewater reasserts, but will not repeat here, its arguments in order to preserve its rights to later review should the ASD deny Tidewater’s petition. However, in summary, Sinclair argue that on Factors 2, 3, 4, 5 and 8, Poquoson is eligible for first local service preference and on factors 1, 6, and 7, the records is inconclusive or tipped in Sinclair’s favor. Tidewater argued that only on Factors 4 and 8 does Poquoson prevail. That means on Factors 1, 2, 3, 5 and 7, Poquoson failed the test. However, the ASD found:

Thus, under *Tuck* factors, 2, 3, 4, 5, 6, and 8, Poquoson is clearly eligible for a first local preference, despite inconclusive findings under *Tuck* factors 1 and 7. Considering our analysis under the three *Tuck* criteria, of which the interdependence of the proposed community to the urbanized area is the most important, we conclude that Sinclair’s proposal to provide Poquoson with its first local aural transmission service deserves a preference under priority 3 of the *FM Priorities*

Even applying a liberal standard, the ASD should have found that Sinclair’s proposal to add the 40th signal for the Norfolk Arbitron market is not a first local service to Poquoson. The Commission must consider the proposal to move FM Channel 291A to Poquoson as really a choice between the loss of Cape Charles’ only commercial radio service and the 40th service to be added to the Norfolk/Virginia Beach/Newport News Urbanized Area. *Fairfield, supra*, is on all fours with the instant case, but the ASD did not even mention it in the *R&O*. In that case, the Commission refused to make the reallocation of Channel 235B from Fairfield, Ohio, to Norwood, Ohio, because it found that Norwood was completely surrounded by Cincinnati, Ohio, which, at the time had 17

local services, and that Norwood was not entitled to a first local service preference. Norwood, like Poquoson, was an incorporated city. Norwood had a 1990 population of 23,674, but was dwarfed by Cincinnati with a 1990 population of 364,040—approximately fifteen times larger. Norwood, like Poquoson, was located within the Urbanized Area in question. Poquoson, with a 2000 population of 11,566, must be compared to the Norfolk/Virginia Beach/Newport News Urbanized Area which had a 2000 population of approximately 1,355,872 persons. Even if Poquoson were compared only to Newport News, which has a population of 180,150, there would be a vast difference in population since Newport News is over 15 times larger in population than Poquoson. The Commission refused to make the reallocation because it would be removing a second local transmission service from Fairfield in order to provide an eighteenth such service to the Cincinnati Urbanized Area. Here, the Commission would be removing the only commercial radio station from Cape Charles, Virginia, to add a 40th service to the Norfolk/Hampton/Newport News Urbanized Area. The Commission should follow the *Fairfield* precedent, and deny Sinclair's Counterproposal.¹⁰

¹⁰ The ASD also failed to consider Tidewater's citation of *Greenfield and Del Rey Oaks, California*, 11 FCC Rcd 12681 (1996), where the Commission refused to allot a Channel to Del Rey Oaks, California, because under Criterion One, signal population coverage, the station would cover 100% of the Urbanized Area; under Criterion Two, size and proximity of the community relative to the main city of the Urbanized Area, Del Rey (1990 population 1,661) is directly between and contiguous to the two central cities of Seaside (population 38,901) and Monterey (population 31,954); and under Criterion Three, Del Rey Oaks was found to be interdependent with the larger Urbanized Area of Seaside-Monterey ("Although it is incorporated, has elected government, and a police department, the mayor and city-council are all part time positions. The city does not collect taxes. It has only one church, one known civic organization and limited business activity. The majority of residents work in surrounding communities.") Poquoson is similar in many respects to Del Rey Oaks, so Sinclair's Counterproposal must suffer the same fate as the proposal for Del Rey Oaks.

In Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, recon. granted in part, 5 FCC Rcd 7094 (1990) the Commission foresaw and cautioned against ploys like Sinclair's: "If, however, after examining the factors enumerated in our decision in RKO General (KFRC), 5 FCC Rcd 3222, [footnote omitted] we were to conclude that awarding a first local service preference to the proposed allotment in the urban area would appear to condone an artificial and unwarranted manipulation of the Commission's policies, no such preference would be awarded. Instead, the allotment would be considered as simply an additional allotment to the urban area. In such cases, therefore, no waiver to allow the change would be granted. Retention of the sole local service in the rural community would be preferred, since a first local service is generally a higher priority than an additional allotment to a community that already enjoys local service." That is precisely the case here. The Poquoson allotment should not be considered as a first local service.

V. Sinclair's Proposal Would Eliminate the Only Commercial Station in Cape Charles

Finally, Tidewater argued that Sinclair's proposal is not in the public interest because its proposal to eliminate the only commercial service in Cape Charles, leaving only noncommercial FM station WAZP, does not constitute a preferential arrangement of allotments under *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The ASD rejected that argument as follows:

Tidewater's arguments are unpersuasive. Sinclair's counterproposal would not eliminate FM transmission service to Cape Charles, Virginia. Noncommercial stations are relevant for purposes of analyzing local service to a community under Section 307(b) of the Act, and all noncommercial stations have an obligation to serve significant programming needs of their communities. Although Station WAZP has a smaller service area than Station WROX-FM, it covers the city limits of Cape Charles with a 70 dBu signal and will be obligated to serve the

community's needs and interests. Moreover, Station WAZP has been granted a construction permit to upgrade its facilities substantially by increasing its effective radiated power and undertaking omnidirectional broadcasting. Further, we agree with Sinclair that two hours of monitoring a radio station's programming is not sufficient to evaluate the extent to which that station is fulfilling its duty to provide local programming. We conclude that Station WAZP will provide fulltime local radio transmission service to Cape Charles after Station WROX-FM is reallocated to Exmore, Virginia.

Tidewater argued that the removal of WROX-FM from Cape Charles, leaving only noncommercial station WAZP does not result in a preferential arrangement of allotments, and that WAZP does not provide equivalent service to WROX-FM. In another case ignored by the ASD, *Sumter, Orangeburg, and Columbia, SC*, 11 FCC Rcd 6376 (1996) the Commission denied a proposal to reallocate and to change the community of license of a Class C1 FM station from the smaller community of Orangeburg (population 13,739) to the larger community of Columbia (population 98,052) because retention of Orangeburg's sixth station outweighed providing Columbia with its fourteenth local transmission service where there would be no actual improvement in technical facilities by the rulemaking petitioner. In another case cited by Tidewater, but not mentioned by the ASD, *Royston and Commerce, GA*, 15 FCC Rcd 5676 (2000), under priority (4), the Commission retained an FM station and allotment in the smaller community of Royston (population 2,758) as a first night-time and second local service rather than change the community of license to the larger community of Commerce (population 4,108) as a second full-time station because the larger population did not justify removing the smaller community's only local night-time service.

VI. Conclusion

Tidewater showed that Sinclair's proposal is fatally defective because (1) USGS 7 5 minute topographic maps show that the Poquoson Reference Site is over water and

unsuitable; (2) Belle Haven is not a community for allotment purposes; (3) Poquoson is merely a "bedroom community" for the Norfolk/Virginia Beach/Newport News Urbanized Area and does not merit a first local service preference, and (4) there are no public interest benefits to removing the only commercial station from Cape Charles to allot the 40th service to the Norfolk/Virginia Beach/Newport News Urbanized Area. As the counterproposal was defective when filed, the ASD should reverse the *R&O*, dismiss the Sinclair proposal to allot Channel 291A to Poquoson, and grant the competing proposal to exchange Channel 250A for Channel 245A at Crisfield, Maryland.

Respectfully submitted,

TIDEWATER COMMUNICATIONS, LLC



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Its Attorney

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November 17, 2003

DECLARATION

William G. Brown, under penalty of perjury, declares as follows:

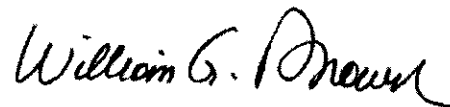
I am president of Bromo Communications, Inc. ("Bromo"), a technical consulting firm based in Atlanta, Georgia. Bromo was retained by Tidewater Communications, Inc., later Tidewater Communications, LLC ("Tidewater"), to prepare technical exhibits to support Tidewater's Reply in MM Docket 02-76.

I have reviewed the Audio Services Division Report and Order that allotted Channel 291A to Poquoson, Virginia, with specific reference to paragraph 7 thereof. I have attempted to duplicate the process described in paragraph 7 using maps from the United States Geological Survey (USGS) internet site (www.usgs.gov) in determining whether those electronic maps show that the reference coordinates 37-12-30 North Latitude, 76-25-05 West Longitude fall upon dry land. I was unable to do so.

I have attached a copy of two maps I prepared in July 2002 from USGS 7.5 minute topographic maps that were submitted with Tidewater's Reply Comments. Exhibit #1 is a portion of a 7.5 minute topographic map (scale 1 to 24000). Exhibit #2 shows the same information except with a larger scale (1 to 6,400). Both maps clearly show the reference site is off the shoreline in the water. I have rechecked the maps and believe they are correct

I have prepared hundreds of submissions to the Commission always relying on the use of 7.5 minute USGS topographic maps. I have never used mapping information from an internet website as described in the Commission's Report and Order. I believe such data would be unreliable and unacceptable.

Executed this 17th Day of November, 2003.

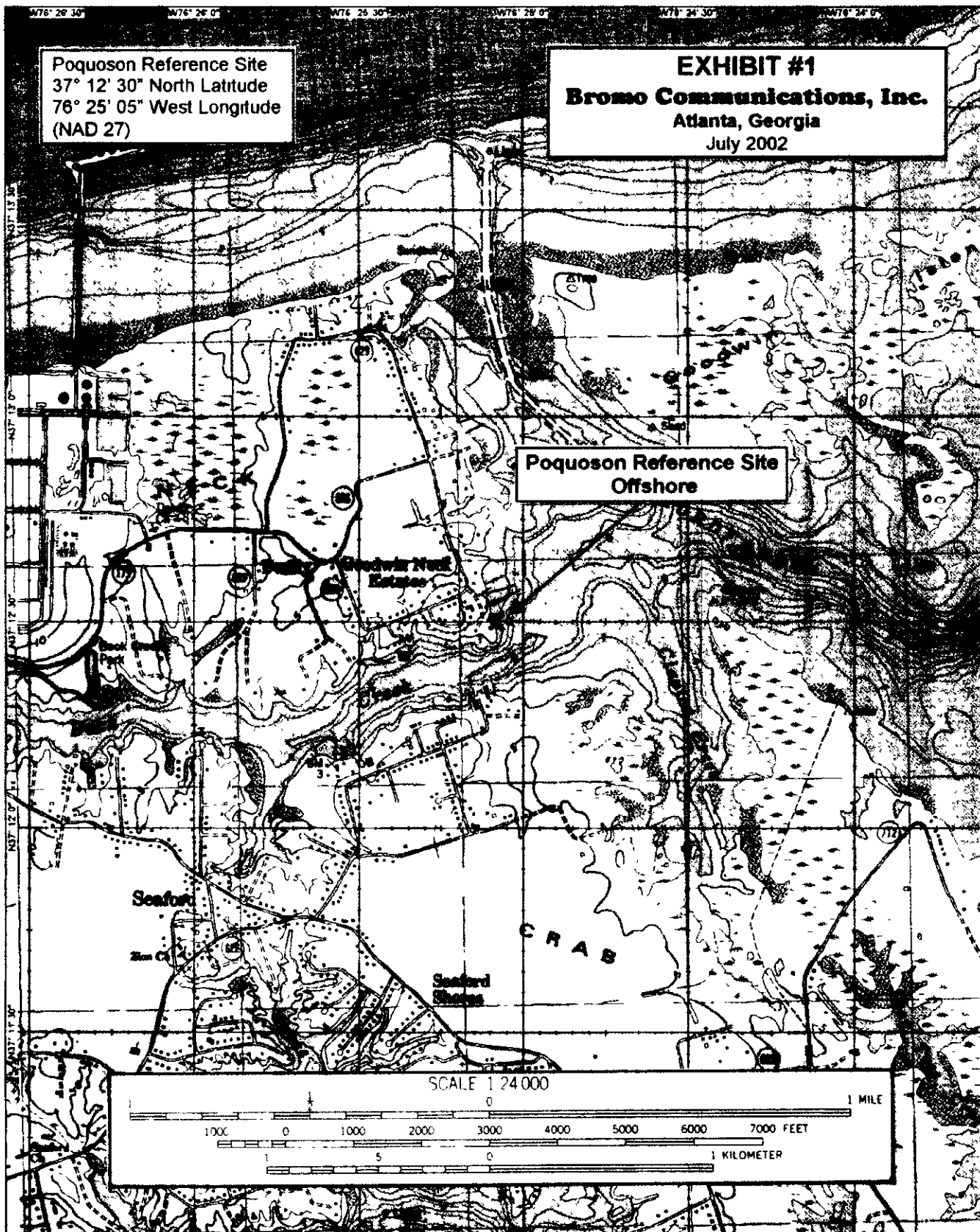
A handwritten signature in black ink that reads "William G. Brown". The signature is written in a cursive, flowing style.

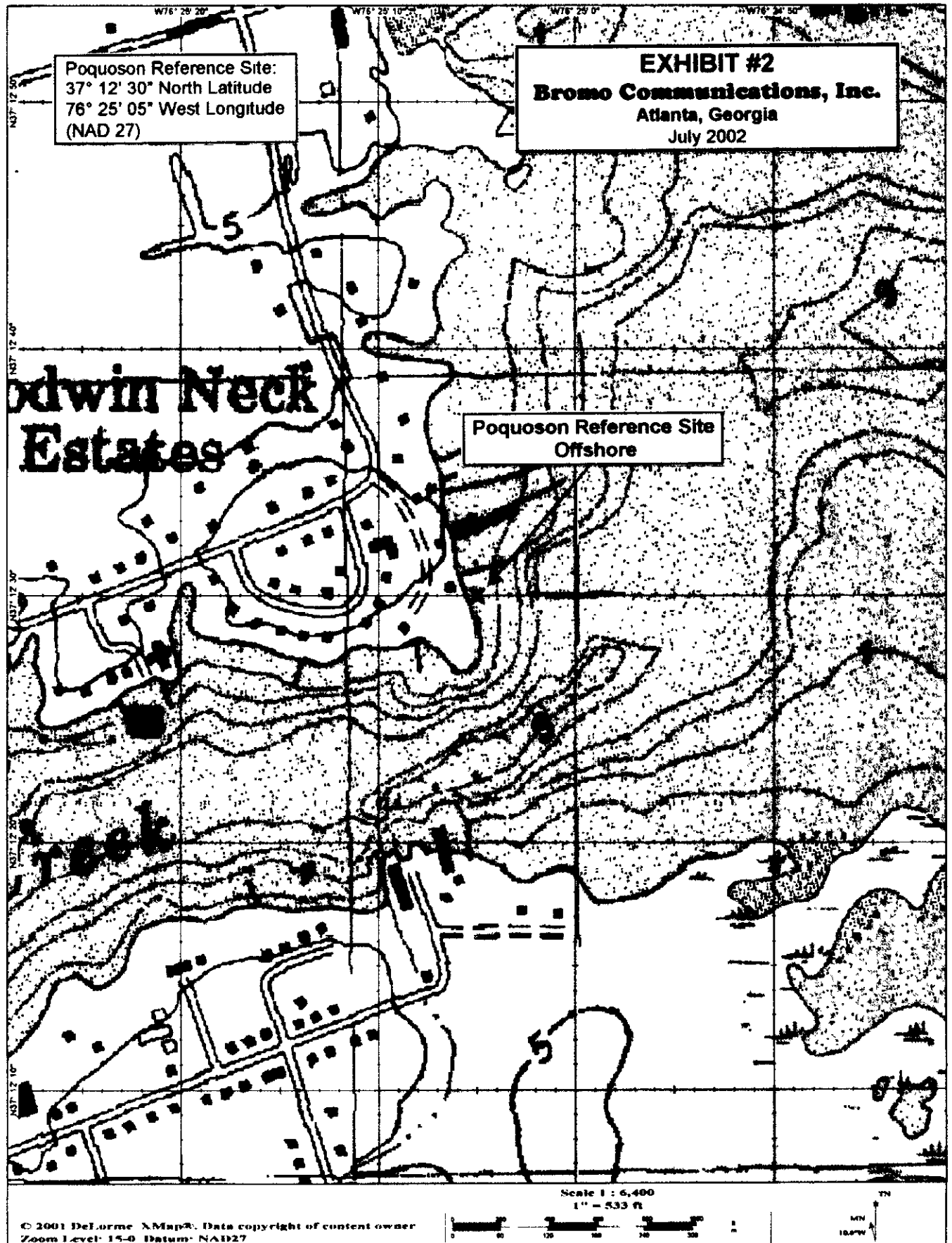
William G. Brown

Poquoson Reference Site
37° 12' 30" North Latitude
76° 25' 05" West Longitude
(NAD 27)

EXHIBIT #1
Bromo Communications, Inc.
Atlanta, Georgia
July 2002

Poquoson Reference Site
Offshore





CERTIFICATE OF SERVICE

I, Sherry Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on November 17, 2003, copies of the foregoing Petition for Reconsideration were sent via first class mail, postage pre-paid, to the following:

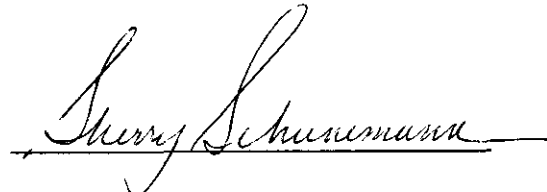
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